No. 94-592

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In The

Supreme Court of the United States

October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, FLORIDA, GEORGIA, IDAHO, INDIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, UTAH, VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is an Illinois statute which sets forth the applicable time period from which previous earnings will be considered in determining whether a claimant is eligible for unemployment insurance benefits a "method[] of administration", subject to the prompt payment "when due" requirement of the Social Security Act, or is it an eligibility standard, excluded from the prompt payment requirement?

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INTEREST OF AMICI STATES

At issue in this case is whether an Illinois statute prescribing the time period over which wage earnings will be counted for the purpose of determining eligibility for state unemployment insurance benefits (the "base period"), is subject to the prompt payment requirements of section 303(a)(1) of the Social Security Act (the "Act"). 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1). The resolution of that issue by the Court of Appeals has jeopardized the continuing validity of the Illinois statute and cast significant doubt upon the legality of base period statutes in effect in the overwhelming majority of the states.

The Court of Appeals held that the Illinois statute is a "method[] of administration" within the meaning of the Act and, therefore, is subject to the Act's requirement that a state promptly pay benefits "when due," rather than being an eligibility standard, which is not subject to the prompt payment requirement. Accordingly, the matter was remanded to the District Court for factual findings and a determination as to whether the Illinois base period statute is in compliance with section 303(a)(1). Specifically, the District Court must determine whether the Illinois statute "insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Pennington v. Didrickson*, 22 F.3d 1376, 1388 (7th Cir. 1994).

As noted in Illinois' petition for writ of certiorari, at least forty-seven other states and jurisdictions, including California and the states that have joined in this brief, have base period statutes similar to the Illinois statute. (Petition for Writ of Certiorari ("Petition"), pp. 7-9, and

ftn. 2.) Those base period statutes were drafted in conformity with suggested legislation ("draft bills") prepared by the United States Department of Labor ("USDOL") to guide the states in crafting their individual unemployment statutes. In reaching its decision, the Court of Appeals refused to defer to the USDOL's regulations and draft bills, which reflect the USDOL's long-standing recognition of the validity of base period standards such as the one at issue.

Amici states now face the likely prospect of legal challenges to their base period statutes as a result of the Court of Appeals' holding that such statutes are subject to the prompt payment provisions of section 303(a)(1) of the Act. These legal challenges will impose substantial defense burdens on each of amici states, since each will be forced to defend its particular base period and related wage information collection system, should the Court of Appeals' decision in this case be followed in its jurisdiction. Furthermore, if base period statutes in other jurisdictions are found to be subject to and out of compliance with section 303(a)(1), massive and costly restructuring of state unemployment wage information collection and processing systems is likely to result. See, e.g., *Pennington*, 22 F.3d at 1380, ftn. 3.[1]

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[1] The ultimate impact of the *Pennington* decision on state unemployment systems is a matter of special concern to states with larger systems, such as California which has the most claims filed of any of the states. In this regard, a recent USDOL report of regular unemployment benefit claims filed over a 12-month period shows there were 3,202,847 initial claims filed in

SUMMARY OF THE ARGUMENT

The Court of Appeals erred when it held that the Illinois base period statute, which clearly is identified and operates as an eligibility provision, is an "administrative method" and, therefore, subject to the prompt payment "when due" clause of section 303(a)(1). The Court of Appeals would not have reached this incorrect result had it deferred to the interpretations of the USDOL in this regard. As a result of the Court of Appeals' decision, unemployment benefit claimants in other states will be encouraged to pursue similar litigation in their states, which will place unnecessary burdens on those other states in defending their statutes, as well as heavy burdens on the trial and appellate courts.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO DEFER TO USDOL'S REASONABLE AND LONG-STANDING INTERPRETATION THAT ILLINOIS' BASE PERIOD COMPLIES WITH THE PROVISIONS OF THE SOCIAL SECURITY ACT

The unemployment insurance system is administered by the states, which receive federal funds for that

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California. The next closest in number is New York with 1,107,833 claims filed. Illinois had 764,856 claims filed during that same period. UI Data Summary, UIS, 2nd Quarter CY94, USDOL, Unemployment Insurance Service, Division of Actuarial Services, September 1994.

purpose. 42 U.S.C. § 502. Section 303(a)(1) of the Social Security Act provides that "[t]he Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor . . . includes provision for . . . [s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). The Secretary of Labor has interpreted this language as requiring "such methods of administration as will reasonable [sic] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

There does not appear to be any disagreement among the parties that substantive state unemployment insurance eligibility requirements are not considered to be "methods of administration" and, therefore, are not subject to the "when due" clause. See *Pennington*, 22 F.3d at 1381, ftn. 4. This conclusion results from the recognition that the states have been given broad latitude to develop their own unemployment compensation eligibility criteria. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 537-540 (1979).

Section 500 of the Illinois unemployment insurance act provides that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that . . . he has been paid during his base period wages for insured work equal to not less than . . . " the minimum amounts specified in the statute. 820 ILCS 405/500. Illinois defines "base period" as "the

first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237. The "benefit year" begins on the first day of the week that a valid claim is filed. 820 ILCS 405/242. In accordance with the above, no earnings are considered from the fifth quarter, which is characterized as the "lag quarter," in determining eligibility for benefits.

The existence of this lag quarter is the focus of respondents' complaint. *Pennington*, 22 F.3d at 1379. Respondents contend that the presence of a lag period operates to delay the payment of benefits to those claimants who initially lack sufficient earnings to qualify for benefits but would be eligible for benefits if their lag period earnings were counted. This could occur if they file a claim during a later quarter.

In determining the applicability of section 303(a)(1) of the Social Security Act to the Illinois base period statute, the Court of Appeals held that the state's base period definition is an "administrative method" subject to the "when due" clause. *Pennington*, 22 F.3d at 1388. The court reached this holding despite the fact that the Illinois base period statute does not address the subject of *when* benefits must be paid. The court failed to accept the fact that the base period statute is intended to be, and does operate as, a substantive standard for determining eligibility for benefits, i.e., a standard for determining *whether* benefits are due.

In reaching its holding, the Court of Appeals considered, but rejected, the contrary position of the USDOL which appeared as amicus curiae below, in support of Illinois. The USDOL took the position that the Illinois

base period standard is a legitimate eligibility requirement that defines what earnings will be considered in determining whether benefits are due. (Brief For The United States of America As Amicus Curiae Supporting the Appellee, before the U.S. Court of Appeals for the Seventh Circuit, May 14, 1992, p. 7.) By failing to defer to the position of the agency which administers the provisions of the Social Security Act relating to unemployment compensation, on a matter not directly addressed in the Act, the Court of Appeals failed to adhere to well-established precedent of this Court. That precedent holds that a court should defer to reasonable interpretations of a federal statute by an agency that administers the statute, provided that the statute is ambiguous or does not address the specific matter at issue and, provided further, that the agency's interpretations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-845 (1984); *National R.R. Passenger Corp. v. Boston & Maine Corp.,* ___ U.S. ___, 112 S. Ct. 1394, 1401 (1992).

The Court of Appeals characterized the USDOL's interpretations of section 303(a)(1) as " 'agency litigating positions,' " not entitled to deference when they are " 'unsupported by regulations, rulings or administrative practice.' " *Pennington,* 22 F.3d at 1383; quoting from *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212 (1988). The Court of Appeals placed great emphasis on what it considered to be a lack of "formal regulations" reflecting the USDOL's interpretations. *Pennington,* at 1383-1384. The court also emphasized that there is no formal USDOL regulation directly stating that "the length of lag periods

is a matter of eligibility within the exclusive authority of the states." *Id.* at 1383.

The standard for deference applied in this instance by the Court of Appeals is too narrow; it does not conform with the standards specified in the above-cited decisions of this Court. Contrary to the Court of Appeals' characterization of the circumstances, existing USDOL regulations and long-standing interpretations relating to base periods support USDOL's position below. In this regard, the USDOL has adopted regulations which expressly implement the provisions of section 303(a)(1) of the Act regarding "methods of administration" and the "when due" clause. See 20 C.F.R. Parts 640 and 650.

Part 640 of the USDOL regulations sets out specific time standards for prompt payment of unemployment benefits by the states. 20 C.F.R. § 640.5. Part 650 prescribes specific time periods for prompt state administrative hearing and decision processes relating to benefit appeals. 20 C.F.R. § 650.4. These implementing regulations single out the states' procedures for the payment of benefits and for appeals as "methods of administration" referred to in section 303(a)(1) of the Act. The regulations are designed to insure the full payment of unemployment benefits to claimants "when determined under the State law to be due." 20 C.F.R. § 640.1(a). Nowhere in USDOL regulations are base period standards identified as "methods of administration" governed by the USDOL regulations.[2]

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[2] With regard to promptness of payment, the regulations note:

> "Accordingly, implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations

In addition to the above formal rules, nearly 60 years ago the USDOL issued policy interpretations relating specifically to base periods. These interpretations are reflected in "draft bills" for suggested state unemployment compensation laws, issued by the USDOL in 1937. In the draft bills, the USDOL placed a base period standard in the section containing suggested eligibility criteria. That particular base period standard provides for a lag quarter just like that used in the Illinois statute. Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, revised edition, January 1937, § 4(e).[3] Nevertheless, the Court of

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> of eligibility. However, applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(b).

The promptness of Illinois' *procedures* for paying benefits and determining eligibility are not at issue in this case; rather, at issue is the substance of Illinois' base period eligibility criteria, a subject which the USDOL recognizes is not within the scope of federal regulation under section 303(a)(1).

[3] The draft bill provides the following with respect to base periods:

> "Benefit Eligibility Conditions
>
> "Sec. 4 An unemployed individual shall be eligible to receive benefits with respect to any week only if the commissioner finds that
>
> ". . . . .
>
> "(e) He has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages for employment by employers equal to not less that sixteen times his weekly benefit amount."

(An errata sheet for the draft bills changed the above to read "the first *three* out of the last *four* completed calendar quarters . . . ," without changing the concept of a "lag" quarter.)

Appeals disregarded these interpretations by the USDOL because it considered them to be ambiguous, noting that they were not adopted as formal regulations. *Pennington*, 22 F.3d at 1384.

The Court of Appeals should have deferred to the USDOL's interpretations of section 303(a)(1), because they are reasonable and are reflected in the USDOL's existing regulations and the long-standing interpretations contained in the draft bills. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Those regulations and draft bills clearly show that the USDOL considers base periods to be eligibility criteria and, therefore, not subject to the "when due" clause of section 303(a)(1). There is no ambiguity with regard to the USDOL's intent in this respect.

II

IF THE ERRONEOUS DECISION BELOW IS ALLOWED TO STAND WITHOUT REVIEW BY THIS COURT, IT WILL BREED A MULTIPLICITY OF UNNECESSARY LITIGATION, IMPOSING SEVERE DEFENSE BURDENS ON AMICI STATES, AND POSSIBLY RESULT IN DISHARMONY AMONG THE CIRCUITS

Litigation similar to that which has occurred in this case is likely to occur in many other states given that at

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The original California base period statute, adopted in 1939, tracks the draft bill:

> "Sec. 52.2 The term 'base period' means the first four out of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year." Stats. Cal., c. 674, § 52.2, p. 2148, 1939.

least forty-seven other states and jurisdictions have similar base period statutes. (Petition, p. 8, ftn. 2.)[4] Potential

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[4] For example, the following provisions are contained in the California Unemployment Insurance Code:

> § 1275. "Unemployment compensation benefit award computations shall be based on wages paid in the base period. 'Base period' means: for benefit years beginning in November, December, or January, the four calendar quarters ended in the next preceding month of June; for benefit years beginning in February, March, or April, the four calendar quarters ended in the next preceding month of September; for benefit years beginning in May, June, or July, the four calendar quarters ended in the next preceding month of December; for benefit years beginning in August, September, or October, the four calendar quarters ended with the next preceding month of March. . . ."
>
> § 1281. "(a) An individual cannot establish a valid claim or a benefit year during which any benefits are payable unless during his or her base period:
>
> ". . . .
>
> "(3) For new claims filed with an effective date beginning on or after January 1, 1992, he or she has met one of the following conditions:
>
> "(A) He or she has been paid wages for employment by employers during the quarter of his or her base period in which his or her wages were the highest of not less than one thousand three hundred dollars ($1,300)."
>
> "(B) He or she has been paid wages for employment by employers during the quarter of his or her base period in which his or her wages were the highest of not less than nine hundred dollars ($900) and been paid wages for employment by employers during his or her base period equal to 1.25 times the amount he or she was paid in this same quarter."

plaintiffs in other states could use virtually the same complaint as that used in this case, since the state statutes are substantially similar, and the same federal statute and regulations are involved. It will conserve precious judicial resources to have the issue presented in this case resolved by this Court now, rather than forcing its resolution among the circuits on a case by case basis.

The sole issue presented by this case is strictly a legal one: the application of the "when due" clause of section 303(a)(1) to base period standards. Resolution of that issue by this Court will ensure harmony among the circuits in this area of the law. Although amici states believe that the Seventh Circuit misconstrued the application of section 303(a)(1), some district and circuit courts considering the issue may follow the Seventh Circuit's lead. The probability of such an outcome is significant given the likelihood of a multitude of legal challenges among the states.

Additionally, in those trial and appellate courts that follow the holding of the Seventh Circuit that the "when due" clause applies to base periods standards, the states will be forced to justify any time delays caused by the lag periods in their base period eligibility criteria. This will impose severe defense burdens upon the states, since the issue of whether a base period is in compliance with the "when due" standard is factually very complex and full of uncertainties, given its direct relationship to each state's capacity to collect and process wage data. That capacity will be measured against the standard of administrative feasibility found in 20 C.F.R. § 640.3(a). Furthermore, if a state base period standard is determined to be out of compliance with the "when due" clause, additional

difficulties will occur in determining what modifications to state unemployment systems will be necessary, how those modifications will be implemented and at what cost. A good example of the complexity of these problems is available in the present litigation. *Pennington*, 22 F.3d at 1378-1380 and ftn. 3.

In a footnote, the Court of Appeals suggests that the USDOL can always "issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations." *Pennington*, 22 F.3d at 1388, ftn. 9. However, such action is highly unlikely given that the USDOL is not bound by the Court of Appeals' decision and the USDOL has taken the position that base periods are not subject to the "when due" clause. The likely result will be that the courts in different states will be forced to determine what is administratively feasible in base period criteria to achieve prompt payment. That will likely yield varying results among the states.

In contrast, if this Court were to rule on the application of the "when due" clause to base periods standards, the result will either be maintenance of the status quo if *Pennington* is reversed or, if the opposite occurs, adoption of a uniform standard for all the states. Thus, if this Court were to find that the "when due" clause does apply to base periods standards, it is very likely that the USDOL would in that event adopt base period regulations for all the states. This is exactly what happened after this Court issued its decision in *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971).[5] See 20 C.F.R. § 650.1(a).

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[5] That case is discussed on pages 11 through 12 of the petition.

Therefore, it will conserve judicial resources, promote harmony among the circuits, and protect the states from unnecessary and costly litigation if this Court accepts this case for review.

CONCLUSION

Resolution by this Court of the question of whether Illinois' base period standard is a method of administration or an eligibility criterion is of immediate and vital importance to each of the amici states and to virtually every other state in the Union. Amici urge the Court to grant Illinois' petition.

Dated: October 28, 1994

Respectfully submitted,

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